

1 THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

3 HONORABLE JANIS L. SAMMARTINO
4 UNITED STATES DISTRICT JUDGE PRESIDING

5 -----
6 ANTICANCER, INC., A CALIFORNIA)
7 CORPORATION,)
8 PLAINTIFF,)
9 VS.) NO. 11-CV-0107-JLS
10 PFIZER, INC., A DELAWARE)
11 CORPORATION; CROWN BIOSCIENCE,)
12 A CALIFORNIA CORPORATION, AND)
13 DOES 1 - 10,)
14 DEFENDANTS.)
15 -----

16 MOTION HEARING
17
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS
19 MAY 31, 2012
20 SAN DIEGO, CALIFORNIA
21
22 GAYLE WAKEFIELD, RPR, CRR
23 OFFICIAL COURT REPORTER
24 UNITED STATES COURTHOUSE
25 940 FRONT STREET, ROOM 3132
SAN DIEGO, CALIFORNIA 92101-8900
PH: 619-239-0652
WAKEFIELDGAYLE@GMAIL.COM

1 APPEARANCES :

2 FOR THE PLAINTIFF:

MATT VALENTI
ANTICANCER, INC.
7917 OSTROW STREET
SAN DIEGO, CA 92111

5
6 FOR THE DEFENDANT:
7 PFIZER

RICHARD DE BODO
DLA PIPER LLP
2000 AVENUE OF THE STARS
SUITE 400, NORTH TOWER
LOS ANGELES, CA 90067

10
11 FOR THE DEFENDANT:
12 CROWN BIOSCIENCE

J. JAMES LI
LI LAW INC.
5050 EL CAMINO REAL, SUITE 200
LOS ALTOS, CA 94022

1 MAY 31, 2012

2 AFTERNOON SESSION

3 THE CLERK: NUMBER ONE ON THE CALENDAR, 11-CV-0107,
4 ANTICANCER VS. PFIZER, FOR MOTION HEARING.

5 THE COURT: GOOD MORNING, COUNSEL. COULD I HAVE
6 APPEARANCES, PLEASE.

7 MR. VALENTI: GOOD MORNING, YOUR HONOR, MATT VALENTI ON
8 BEHALF OF ANTICANCER, INCORPORATED, AND I HAVE WITH ME DR.
9 ROBERT M. HOFFMAN, PRESIDENT AND CEO.

10 THE COURT: GOOD MORNING, SIR.

11 DR. HOFFMAN: GOOD MORNING, YOUR HONOR.

12 MR. LI: GOOD MORNING, YOUR HONOR --

13 THE COURT: I'M GOING TO TAKE THE APPEARANCES HERE IN
14 COURT AND THEN GO TO THOSE OF YOU WHO ARE APPEARING
15 TELEPHONICALLY.

16 MR. LI: ALL RIGHT.

17 MR. DE BODO: GOOD MORNING, YOUR HONOR, RICHARD DE
18 BODO, OF DLA PIPER, REPRESENTING PFIZER, AND WITH ME IS JEFF
19 RENNECKER OF PFIZER.

20 THE COURT: THANK YOU. GOOD MORNING. NOW APPEARING
21 TELEPHONICALLY.

22 MR. LI: GOOD MORNING, YOUR HONOR, JIM LI FOR DEFENDANT
23 CROWNBIO.

24 THE COURT: THANK YOU. MR. LI, IF AT ANY TIME YOU
25 CAN'T HEAR US, PLEASE LET US KNOW.

1 MR. LI: THANK YOU.

2 THE COURT: YOU'RE WELCOME. I'M GOING TO GIVE A
3 TENTATIVE RULING IN THIS MATTER, AND I'VE GOT SOME QUESTIONS,
4 AND THEN I'LL HEAR FROM EVERYBODY ON ANYTHING ELSE YOU WOULD
5 LIKE TO TELL THE COURT.

6 CAN YOU HEAR ME ALL RIGHT, MR. LI?

7 MR. LI: YES.

8 THE COURT: PRESENTLY BEFORE THE COURT ARE PFIZER'S
9 MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT BASED ON
10 DEFECTIVE INFRINGEMENT CONTENTIONS, WHICH CROWNBIO JOINS IN
11 PART, AND CROWNBIO'S MOTION FOR JUDGMENT ON THE PLEADING, WHICH
12 PFIZER JOINS. ALSO BEFORE THE COURT ARE THE ASSOCIATED
13 OPPOSITIONS AND REPLIES, AND THE PARTIES' SUPPLEMENTAL BRIEFS.
14 HAVING CONSIDERED THE PARTIES' ARGUMENTS AND THE LAW, THE COURT
15 HAS TENTATIVE RULINGS ON BOTH MOTIONS, AND HAS PREPARED
16 QUESTIONS FOR THE PARTIES.

17 TURNING FIRST TO PFIZER'S MOTION FOR SUMMARY JUDGMENT,
18 THE COURT IS TENTATIVELY INCLINED TO GRANT IN PART AND DENY IN
19 PART THE MOTION. THE COURT GRANTS SUMMARY JUDGMENT AS TO THE
20 '812 PATENT BECAUSE ANTICANCER DOES NOT OPPOSE THE MOTION FOR
21 SUMMARY JUDGMENT ON THIS BASIS AND BECAUSE THE '812 PATENT IS
22 UNENFORCEABLE HAVING BEEN SURRENDERED UPON THE ISSUANCE OF THE
23 '337 REISSUE PATENT.

24 AS TO THE '159 PATENT AND THE '337 REISSUE PATENT, THE
25 COURT FINDS THAT ANTICANCER'S PRELIMINARY INFRINGEMENT

1 CONTENTIONS ARE INSUFFICIENT TO COMPLY WITH PATENT LOCAL RULE
2
3 3.1. THE SOUTHERN DISTRICT'S LOCAL PATENT RULES REQUIRE
4 PARTIES TO STATE WITH SPECIFICITY THEIR THEORIES OF
5 INFRINGEMENT, AND TO DO SO EARLY ON IN THE LITIGATION. THIS
6 REQUIRES THAT THE PICS CONTAIN SUFFICIENT SPECIFICITY TO
7 PROVIDE DEFENDANTS WITH NOTICE OF INFRINGEMENT BEYOND THAT
8 WHICH IS PROVIDED BY THE MERE LANGUAGE OF THE PATENTS
9 THEMSELVES, BUT NEED NOT BE SO DETAILED AS TO TRANSFORM THE
10 PICS INTO A FORUM FOR THE LITIGATION OF THE SUBSTANTIVE ISSUES.
11 ANTICANCER'S PRELIMINARY INFRINGEMENT CONTENTIONS FAIL TO MEET
12 THIS STANDARD.

12 AS TO THE PROMOTER MONITORING ELEMENT OF THE '159
13 PATENT, THE COURT INCLUDES THAT THE PICS INSUFFICIENTLY SET
14 FORTH HOW PFIZER' ALLEGEDLY FRINGING CONDUCT SATISFIES THIS
15 ELEMENT. THE PICS CITE TO A SINGLE SENTENCE AND FIGURE FROM
16 THE PFIZER PAPER WITHOUT PROVIDING ANY EXPLANATION FOR HOW LONG
17 THESE CITATION -- CITATIONS MAP ON TO THE CLAIM LANGUAGE.
18 ANTICANCER NEEDS TO CONNECT THE DOTS FOR HOW PFIZER'S
19 RESEARCH -- AS DETAILED IN THE PAPER -- READS ON THE ASSERTED
20 CLAIM LANGUAGE. EVEN AT THIS EARLY STAGE, AS EVIDENCED BY THE
21 ARGUMENTS RAISED IN THE OPPOSITION BRIEF, ANTICANCER IS CAPABLE
22 OF THIS MUCH.

23 THE COURT LIKEWISE FINDS THAT ANTICANCER'S PRELIMINARY
24 INFRINGEMENT CONTENTIONS FAIL TO ESTABLISH WITH SUFFICIENT
25 SPECIFICITY THAT PFIZER PRACTICED THE DELIVERING CELLS ELEMENT

1 OF THE '159 PATENT. ANTICANCER AGAIN GENERALLY POINTS TO A
2 FIGURE AND A PORTION OF THE PAPER'S TEXT, WITHOUT ANY
3 ADDITIONAL EXPLANATION FOR HOW PFIZER'S CONDUCT SATISFIES THIS
4 ELEMENT.

5 ANTICANCER'S THEORY OF INFRINGEMENT MIGHT BE INFERRED
6 IS NOT ENOUGH. THE POINT OF PICS IS NOT TO IMPLY HOW PLAINTIFF
7 CONTENDS THE DEFENDANT IS INFRINGING ITS PATENT, RATHER THEY
8 ARE DESIGNED FOR A PLAINTIFF TO STATE WITH SPECIFICITY ITS
9 CONTENTIONS OF INFRINGEMENT.

10 TO THAT END, THE CONNECTION BETWEEN THE CLAIMED
11 LANGUAGE AND PFIZER CONDUCT THAT ANTICANCER MAKES IN ITS
12 OPPOSITION BRIEF MUST BE SET FORTH IN THE PRELIMINARY
13 INFRINGEMENT CONTENTIONS, EVEN IF THEY ARE BASIC SCIENTIFIC
14 CONCEPTS THAT ARE GENERALLY KNOWN OR PUBLICLY AVAILABLE.

15 FINALLY, THE COURT ALSO FINDS THAT THE PRELIMINARY
16 INFRINGEMENT CONTENTIONS ARE INSUFFICIENT WITH REGARD TO THE
17 METASTASIS TO A SECOND SITE ELEMENT OF THE '337 REISSUE PATENT.
18 ANTICANCER'S BARE CITATIONS TO THE TEXT OF THE PFIZER/CROWNBIO
19 POSTER ARE INSUFFICIENT TO COMPLY WITH PATENT LOCAL RULE 3.1.
20 EVEN CONSIDERING THE POINTS RAISED IN ANTICANCER'S OPPOSITION
21 BRIEF, ANTICANCER HAS LEFT OUT THE ESSENTIAL CONNECTION BETWEEN
22 THE CLAIM LANGUAGE AND THE ALLEGEDLY INFRINGING ACTS, NAMELY,
23 HOW THE GROWTH OF THE TUMOR AT THE PRIMARY SITE PROVIDES DIRECT
24 EVIDENCE THAT THE MICE WERE SUFFICIENTLY IMMUNE DEFICIENT TO
25 ALLOW FOR METASTASIS TO A SECONDARY SITE. BY SKIPPING THIS

1 ESSENTIAL CONNECTION, ANTICANCER LEAVES DEFENDANTS AND THE
2 COURT GUESSING HOW THE PATENT WAS ALLEGEDLY INFRINGED.

3 HAVING DETERMINED THAT THE PICS ARE INSUFFICIENT, THE
4 COURT NEXT CONSIDERS WHAT THE EFFECT OF THIS FAILURE OUGHT TO
5 BE. HAVING REVIEWED THE PARTIES' SUPPLEMENTAL BRIEFING, AND
6 THOROUGHLY CONSIDERED THE ISSUE, THE COURT IS TENTATIVELY
7 INCLINED TO DENY THE MOTION FOR SUMMARY JUDGMENT, AND INSTEAD
8 TO CONDITIONALLY GRANT ANTICANCER AN OPPORTUNITY TO AMEND THEIR
9 PRELIMINARY INFRINGEMENT CONTENTIONS.

10 THE COURT BELIEVES THAT IT IS TOO EARLY IN THIS LAWSUIT
11 TO DISPOSE OF ANTICANCER'S CASE FOR ITS FAILURE TO COMPLY WITH
12 THE LOCAL RULE, BUT TOO LATE IN THE LAWSUIT TO ALLOW ANTICANCER
13 TO CURE ITS DEFICIENCY WITHOUT MITIGATING CONDITIONS.

14 ACCORDINGLY, THE COURT IS INCLINED TO PERMIT ANTICANCER TO
15 AMEND ITS PRELIMINARY INFRINGEMENT CONTENTIONS, BUT ONLY ON THE
16 CONDITION THAT IT REIMBURSE PFIZER AND CROWNBIO FOR THE
17 REASONABLE COSTS AND ATTORNEYS' FEES INCURRED IN LITIGATING
18 THIS MOTION.

19 THE COURT WOULD LIKE THE PARTIES TO COMMENT ON THIS
20 PROPOSED REMEDY, AND I HAVE SOME QUESTIONS TO ASK YOU ABOUT
21 THAT.

22 NOW I'M GOING TO TURN TO CROWNBIO'S MOTION FOR JUDGMENT
23 ON THE PLEADING. THE COURT IS TENTATIVELY INCLINED TO GRANT
24 THE MOTION, BUT TO PERMIT ANTICANCER TO FILE AN AMENDED
25 COMPLAINT. CROWNBIO ARGUES THAT ANTICANCER HAS NOT STATED A

1 CLAIM PURSUANT TO 35 U.S.C. 271(G) BECAUSE IT HAS NOT ALLEGED
2 ANY FACTS SHOWING THAT DEFENDANTS IMPORTED INTO THE UNITED
3 STATES THE PATENTED NUDE MOUSE MODELS THAT ARE MADE BY THE
4 PATENTED PROCESS OF THE '337 REISSUE PATENT. ON THE BASIS OF
5 THE PLEADINGS ALONE, THE COURT IS TENTATIVELY INCLINED TO
6 AGREE. NONE OF ANTICANCER'S FACTUAL ALLEGATIONS STATE THAT
7 DEFENDANTS IMPORTED NUDE MOUSE MODELS, NOR DO THE FACTS AS PLED
8 SUPPORT A REASONABLE INFERENCE OF SUCH INFRINGING ACTIVITY.

9 THE COURT'S TENTATIVE RULING IS UNCHANGED BY THE
10 ALLEGATIONS ANTICANCER RAISES FOR THE FIRST TIME IN ITS
11 OPPOSITION BRIEF. ANTICANCER ASSERTS THAT DEFENDANTS ARE
12 LIABLE FOR INFRINGEMENT UNDER SECTION 271(G) BECAUSE THEY
13 UTILIZED THE PATENTED PROCESS OF CREATING A NUDE MOUSE MODEL IN
14 ORDER TO TEST AND MANUFACTURE PFIZER'S CANCER TREATMENT DRUG,
15 WHICH PFIZER MARKETS AND SELLS IN THE UNITED STATES, BUT THE
16 FEDERAL CIRCUIT ALREADY FORECLOSED THIS EXACT ARGUMENT IN THE
17 BAYER CASE. ANTICANCER ATTEMPTS TO DISTINGUISH -- ANTICANCER'S
18 ATTEMPTS TO DISTINGUISH BAYER ARE UNPERSUASIVE, AND ITS
19 POLICIES CONSIDERATIONS, HOWEVER VALID, CANNOT SWAY THE COURT
20 AWAY FROM ADHERING TO BAYER.

21 THE PARTIES ARE REMINDED THIS IS ONLY THE COURT'S
22 TENTATIVE AND IS SUBJECT TO CHANGE IN LIGHT OF THE ARGUMENTS
23 PRESENTED TODAY. I HAVE QUESTIONS FOR EVERYONE, AND I WOULD
24 ASK YOU TO PAY CLOSE ATTENTION AND JUST ANSWER THE QUESTION I
25 POSE BECAUSE I WILL GIVE YOU SOME TIME AT THE CONCLUSION OF

1 QUESTIONS TO TELL THE COURT ANYTHING YOU WOULD LIKE TO TELL ME.

2 I WOULD LIKE TO START WITH ANTICANCER, IF YOU WOULD
3 TAKE THE PODIUM, COUNSEL.

4 MR. VALENTI: THANK YOU, YOUR HONOR.

5 THE COURT: COUNSEL, DO YOU CONCEDE THAT SUMMARY
6 JUDGMENT SHOULD BE ENTERED IN DEFENDANT'S FAVOR ON THE '812
7 PATENT?

8 MR. VALENTI: YES, WE DO CONCEDE THAT, YOUR HONOR.

9 THE COURT: OKAY. YOU'VE HEARD THE COURT'S COMMENTS.
10 IS THERE ANYTHING THAT YOU WOULD LIKE TO ADD IN SUPPORT OF YOUR
11 ARGUMENT THAT THE PRELIMINARY INFRINGEMENT CONTENTIONS ARE
12 SUFFICIENT, AND IF YOU WOULD TAILOR YOUR ARGUMENT ONLY TO
13 INFORMATION ACTUALLY PROVIDED IN THE INFRINGEMENT CONTENTIONS
14 AND HOW THAT INFORMATION IS SUFFICIENT TO COMPLY WITH 3.1, AS
15 ANYTHING OTHER THAN THAT INFORMATION WOULD BE EXTRINSIC TO THE
16 PICS AND CAN'T BE USED TO BOLSTER THEIR SUFFICIENCY. SO GO
17 AHEAD, SIR.

18 MR. VALENTI: SURE. THANK YOU VERY MUCH, YOUR HONOR,
19 AND THANK YOU FOR YOUR TENTATIVE RULING.

20 FIRST OF ALL, I THINK ONE THING THE COURT SHOULD
21 CONSIDER IS THIS IDEA THAT CONCEPTS IN THE PIKS WERE IMPLICIT
22 OR SHOULD HAVE BEEN UNDERSTOOD BECAUSE THEY WERE BASIC
23 SCIENTIFIC CONCEPTS, AND WE STAND BY THAT ARGUMENT. PERHAPS A
24 MORE APPROPRIATE WORD TO HAVE USED WOULD BE THE WORD INHERENT.
25 INHERENT CAN BE DEFINED AS EXISTING IN SOMETHING AS A PERMANENT

1 OR ESSENTIAL ATTRIBUTE, AND WE BELIEVE THAT THE --

2 THE COURT: SO RATHER THAN IMPLIED, YOU'RE ASKING ME TO
3 -- YOU'RE SAYING IT'S INHERENT WITHIN WHAT'S SAID.

4 MR. VALENTI: IT'S INHERENT, CORRECT, YOUR HONOR.

5 THE COURT: OKAY.

6 MR. VALENTI: THIS IS KIND OF A COLLOQUIAL EXAMPLE, BUT
7 IF YOU GAVE INSTRUCTIONS TO SOMEONE FOR MAKING A PIZZA AND YOU
8 SAID, "FIRST PUT THE TOMATO SAUCE ON THE DOUGH," WE ALL KNOW
9 THAT TOMATO SAUCE IS MADE WITH TOMATOES. IN THIS INSTANCE, FOR
10 INSTANCE, DELIVERING CELLS IS A BASIC SCIENTIFIC CONCEPT THAT
11 YOU CANNOT HAVE A TRANSGENIC MOUSE WITHOUT AT SOME POINT
12 DELIVERING CELLS TO EITHER THE PARENT OR THE GRANDPARENT OF
13 THAT MOUSE. SO DID WE IN THE PICS SPECIFICALLY STATE THAT THE
14 CELLS WERE DELIVERED BY PFIZER? NO, BUT IT'S ANALOGOUS TO
15 SAYING THAT THE TOMATO SAUCE WAS PUT ON THE PIZZA, AND, OF
16 COURSE, THE TOMATO SAUCE WAS MADE WITH TOMATOES.

17 IN THIS CASE, THE TRANSGENIC MICE WERE CLEARLY BEING
18 USED BY PFIZER. THERE'S NO DISPUTE THAT THESE MICE WERE
19 TRANSGENIC AND EXPRESSED GFP. IT IS INHERENT IN THAT, IN A
20 TRANSGENIC MOUSE, THAT CELLS WERE DELIVERED. IT'S A BASIC
21 SCIENTIFIC CONCEPT, WHICH WE FEEL THE PICS DIDN'T NEED TO
22 SPECIFY, JUST AS YOU WOULDN'T NEED TO SPECIFY THAT TOMATO SAUCE
23 IS MADE OUT OF TOMATOES.

24 SAME THING WITH PROMOTER MONITORING. IF YOU'RE LOOKING
25 AT A TRANSGENIC MOUSE EXPRESSING GFP, YOU ARE SEEING -- YOU ARE

1 MONITORING THE PROMOTER. THERE'S NO OTHER WAY TO DO IT BECAUSE
2 THE GENE THAT IS EXPRESSING THE GFP PROTEIN IS -- THE PROMOTER
3 IS BEING SHOWN WHEN YOU'RE VIEWING THAT. YOU ARE INTRINSICALLY
4 MONITORING THE ACTIVITY OF THE PROMOTER WHEN YOU ARE IMAGING A
5 MOUSE EXPRESSING GFP. SO AGAIN WE THINK THAT THAT WAS
6 SUFFICIENT IN THE PICS. THE PICS SUFFICIENTLY EXPLAIN THAT.

7 AND THEN FINALLY, ON THE ISSUE OF METASTASIS TO A
8 SECOND SITE IN THE '337 PATENT, AGAIN, IT'S INHERENT THAT WHEN
9 YOU IMPLANT A TUMOR FRAGMENT ONTO THE LIVER OF A NUDE MOUSE OR
10 A SUFFICIENTLY IMMUNOCOMPROMISED MOUSE THAT IS SUFFICIENT TO
11 ALLOW THE TUMOR TO METASTASIZE, AND THAT'S ALL THAT THE CLAIM
12 REQUIRES -- THAT'S ALL THAT THIS CLAIM ELEMENT REQUIRES.

13 IF YOU'LL BEAR WITH ME, I WOULD JUST LIKE TO QUOTE FROM
14 THE PATENT. "THE MOUSE NEED TO HAVE SUFFICIENT
15 IMMUNODEFICIENCY TO ALLOW SAID TRANSPLANTED NEOPLASTIC TISSUE
16 TO GROW AT SAID PRIMARY SITE," AND IT IS INHERENT IN THE CROWN
17 ABSTRACT THAT THEY WERE USING AN IMMUNOCOMPROMISED MOUSE, THEY
18 IMPLANTED A TUMOR FRAGMENT, AND THAT WAS SUFFICIENT TO ALLOW
19 THAT TUMOR FRAGMENT TO METASTASIZE TO A SECOND SITE. IT'S
20 INHERENT IN THAT.

21 THE COURT: SO YOU THINK THAT THERE'S SUFFICIENT --
22 I'VE GOT TO THINK ABOUT THE DISTINCTION, IF I UNDERSTAND WHAT
23 YOU'RE SAYING. OKAY, LET ME MOVE ON TO ANOTHER QUESTION,
24 COUNSEL.

25 MR. VALENTI: SURE.

1 THE COURT: YOU NEVER ASKED OR SOUGHT LEAVE TO AMEND
2 YOUR PRELIMINARY INFRINGEMENT CONTENTIONS, NOR HAVE YOU
3 INDICATED IN YOUR OPPOSITION THAT ANY AMENDMENT MIGHT BE
4 FRUITFUL. NONETHELESS, IN LIGHT OF THE COURT'S TENTATIVE
5 RULING, WOULD YOU COMMENT ON WHETHER YOU COULD CURE THE
6 DEFICIENCIES NOTED IF GIVEN AN OPPORTUNITY TO AMEND?

7 MR. VALENTI: CERTAINLY, YOUR HONOR. IF THE COURT IS
8 INCLINED, AS THE TENTATIVE SUGGESTS, TO RULE THAT THE PICS WERE
9 INSUFFICIENT, I DO FEEL AS IF I HEARD FROM THE COURT THAT THE
10 ARGUMENTS WE MADE IN THE OPPOSITION BRIEFS PERHAPS AT LEAST
11 WERE SUFFICIENT TO CURE THE PICS. WE MORE EXPLICITLY EXPLAIN
12 THAT THE TOMATO SAUCE WAS MADE FROM TOMATOES, AND WE COULD DO
13 THE SAME THING IN AN AMENDED PICS.

14 THE COURT: I UNDERSTAND THAT YOUR FIRST AVENUE IS THAT
15 THIS IS ALL INHERENT AND I SHOULD TAKE ANOTHER LOOK AT IT,
16 WHICH I WILL DO AFTER TODAY, BUT YOU COULD GO FURTHER IF MY
17 TENTATIVE WERE TO HOLD.

18 MR. VALENTI: CERTAINLY, YOUR HONOR, WE COULD AMEND THE
19 PICS AND ADD THAT EXTRA DETAIL, THAT EXTRA EXPLANATION, WHICH,
20 IF I MAY ADD, I THINK IT'S UNNECESSARY ONLY BECAUSE PFIZER IS A
21 VERY SOPHISTICATED COMPANY, WITH VERY SOPHISTICATED SCIENTISTS
22 AND LAWYERS. WE BELIEVED ALL ALONG THAT WHEN THEY READ THE
23 PICS, WHEN THEY SAW THE EVIDENCE THEY KNEW THAT WE HAD STATED
24 WITH SPECIFICITY THAT THERE WAS INFRINGEMENT. NEVERTHELESS,
25 THEY'VE KIND OF TAKEN THIS POSITION WHICH IS SEE NO EVIL, HEAR

1 NO EVIL, SPEAK NO EVIL, AND IF WE NEED TO MORE CLEARLY EXPLAIN
2 EXACTLY THE EVIL -- PARDON THE EXPRESSION -- THAT WAS
3 COMMITTED, WE'RE GLAD TO DO THAT, YOUR HONOR.

4 THE COURT: I TOLD YOU THAT THE COURT WAS TENTATIVELY
5 INCLINED TO CONDITIONALLY GRANT YOU AN OPPORTUNITY TO AMEND THE
6 PICS ON THE CONDITION THAT YOU REIMBURSE FOR COSTS AND FEES IN
7 LITIGATING THE MOTION FOR SUMMARY JUDGMENT. DO YOU WANT TO
8 COMMENT ON THAT, SIR.

9 MR. VALENTI: I GUESS THE MOST I COULD SAY RIGHT NOW IS
10 THIS IS A NEW IDEA FOR US, AND SO I WOULD HAVE TO DISCUSS WITH
11 MY CLIENT WHETHER WE WOULD BE ABLE TO DO THAT, AND I GUESS A
12 LOT OF THAT WOULD DEPEND ON EXACTLY THE AMOUNTS THAT PFIZER
13 WOULD CLAIM THEY SPENT PURSUING THIS MOTION. SO MY SHORTHAND
14 ANSWER IS, YOUR HONOR, WE APPRECIATE THE OPPORTUNITY, AND THE
15 ANSWER IS THAT IT DEPENDS.

16 THE COURT: SO MY NEXT QUESTION, MAYBE YOU'RE NOT ABLE
17 TO ANSWER, BUT IF MY TENTATIVES STAND, I WONDERED IF YOU KNEW
18 AT THIS TIME WHETHER YOU WOULD BE INCLINED TO ACCEPT THE
19 CONSEQUENCES, AMEND, AND PAY WHATEVER CONSEQUENCES MIGHT BE OR
20 LET SUMMARY JUDGMENT GET GRANTED. I APPRECIATE MAYBE YOU'RE
21 NOT ABLE TO ANSWER THAT NOW.

22 MR. VALENTI: IF YOU LIKE, I COULD HAVE A SHORT
23 COLLOQUY WITH MY CLIENT AND GET YOU AT LEAST AN INDICATION OF
24 WHAT WE THINK WOULD BE OKAY.

25 THE COURT: I'VE GOT QUESTIONS FOR THE OTHER SIDE ON

1 THE MSJ, AND THEN I'VE GOT QUESTIONS FOR BOTH SIDES ON JUDGMENT
2 ON THE PLEADINGS, SO, SURE, TAKE A MOMENT AND TALK TO DR.
3 HOFFMAN.

4 MR. VALENTI: OKAY. THANK YOU VERY MUCH, YOUR HONOR.

5 THE COURT: AND WE'LL COME BACK TO THAT QUESTION.

6 (DISCUSSION HELD OFF THE RECORD.)

7 THE COURT: I WOULD LIKE TO MOVE ON TO PFIZER'S SIDE.

8 MR. DE BODO: GOOD MORNING, YOUR HONOR.

9 THE COURT: GOOD MORNING, COUNSEL.

10 LET'S START WITH A WORD THAT COUNSEL BROUGHT UP AND HE
11 SAYS HE'S NOT REALLY MISSING ANYTHING BECAUSE I USED THE TERM
12 THAT I CAN'T IMPLY -- HE SAYS THIS IS INHERENT, WHICH GIVES ME
13 A LITTLE PAUSE. HE SAYS THIS IS INHERENT IN THIS, SO COMMENT
14 ON THAT, IF YOU WOULD, AND THAT ARGUMENT.

15 MR. DE BODO: CERTAINLY, YOUR HONOR. I THINK THAT THE
16 ARGUMENT ABOUT INHERENCY IS A RED HERRING AND IT'S AN
17 INAPPROPRIATE ARGUMENT TO MAKE. INHERENCY IS A DOCTRINE WHICH
18 IS USED IN CONNECTION WITH THE -- EXAMINATIONS OF PATENTS, AND
19 OCCASIONALLY PIECES OF PRIOR ART, TO ASK THE QUESTION WHAT IS
20 REALLY BEING SAID AND WHAT IS BEING COMMUNICATED IN THIS PATENT
21 OR IN THIS PIECE OF PRIOR ART, WRITTEN TO SCIENTISTS IN GENERAL
22 ABOUT WHAT'S -- WHAT'S BEING DESCRIBED.

23 HERE WE'RE TALKING, REMEMBER, ABOUT COURT REQUIRED
24 PRELIMINARY INFRINGEMENT CONTENTIONS, THE PICS. THIS IS NOT --
25 THESE ARE NOT SCIENTIFIC DOCUMENTS THAT HAVE BEEN WRITTEN FOR

1 MULTIPLE UNKNOWN PURPOSES THAT MAY HAVE COME OUT OF HISTORY.
2 THESE -- THE PICS WERE WRITTEN SPECIFICALLY TO INFORM YOUR
3 OPPOSING LITIGANT WHAT YOUR CLAIMS ARE, AND TO POINT OUT
4 SPECIFICALLY WHY YOU STATE A VIABLE CLAIM, IF YOU DO, FOR
5 INFRINGEMENT.

6 HERE, THE PICS CLEARLY ESTABLISH THAT THE -- ANTICANCER
7 DOES NOT STATE A VIABLE CLAIM. THEY HAVEN'T STATED A CLAIM,
8 AND, IN FACT, THE UNWILLINGNESS AND THE HESITANCY TO TRY TO
9 FILL IN THE GAPS I THINK REFLECTS NOT SIMPLY SORT OF A
10 GAMESMANSHP BUT MORE OF A RECOGNITION THAT THESE PATENTS DON'T
11 COVER THE ACTIONS AND THE SCIENTIFIC ACTIVITY THAT THEY'RE
12 TARGETED AT.

13 INHERENCY -- IN OTHER WORDS, WE'RE NOT SUPPOSED TO, THE
14 COURT, LAWYERS FOR THE DEFENDANTS, AND SO FORTH, ARE NOT
15 SUPPOSED TO TRY TO DEVINE WHAT ANTICANCER'S INFRINGEMENT THEORY
16 IS. THEY'RE SUPPOSED TO TELL US IN ABSOLUTELY EXPLICIT TERMS,
17 THEY'RE SUPPOSED TO SHOW, THE RULES ARE CLEAR ON THIS, WHERE IN
18 THE DOCUMENTS, WHERE IN THE INSTRUMENTALITIES, THE ASPECTS OF
19 THE PATENT ARE THAT ARE DESCRIBED IN THE CLAIMS, AND, AS WE I
20 THINK ESTABLISH NOW IN MULTIPLE ROUNDS OF BRIEFING, THEY
21 HAVEN'T DONE THAT. THEY DON'T SEEM CAPABLE OF DOING THAT, AND
22 THAT'S BECAUSE THESE PATENTS REALLY DON'T COVER THE SCIENTIFIC
23 ACTIVITY DESCRIBED IN THE SINGLE POSTER AND THE SINGLE ARTICLE
24 THAT THEY'RE PREDICATING THEIR CASE ON. AND SO I THINK
25 INHERENCY IS NOT REALLY AN APPLICABLE DOCTRINE HERE.

1 WE DON'T AGREE, OF COURSE, WITH THE CONCLUSIONS. WE
2 RESPECTFULLY DISAGREE THAT THINGS ARE INHERENT. SO EVEN IF WE
3 WERE TO MOVE BEYOND WHETHER IT'S AN APPROPRIATE ARGUMENT TO
4 MAKE, YOU KNOW, WE DON'T REALLY AGREE WITH THE STATEMENTS.

5 I MEAN, IF YOU READ DR. HOFFMAN'S STATEMENTS IN HIS
6 DECLARATION, THEY'RE QUITE EQUIVOCAL. THEY'RE KIND OF VERY
7 LAWYER -- IT'S WRITTEN BY A LAWYER, IT SEEMS, MORE THAN BY A
8 SCIENTIST. I MEAN, THE WORDS THAT ARE USED ARE THINGS LIKE
9 "PROBABLY," AND OFTEN IN THESE TYPES OF SITUATIONS YOU HAVE
10 THIS TYPE OF ACTIVITY. THAT'S NOT THE BASIS TO PROVE
11 INFRINGEMENT. ULTIMATELY, THE BURDEN IS ON ANTICANCER TO SAY
12 THAT THE ACTIVITY DESCRIBED IN THIS ARTICLE AND THIS POSTER
13 INFRINGE THE PATENTS AND MET EACH AND EVERY ELEMENT, AND SO IF
14 YOU'RE TALKING ABOUT THE MONITORING PROMOTER, TO SORT OF SAY A
15 LOT OF TIMES THERE'S A PROMOTER AND THIS TYPE OF DESCRIPTION
16 SEEMS TO PERHAPS INDICATE OR PROBABLY INDICATES IT OR PROBABLY
17 DELIVERED CELLS, I MEAN, THIS TYPE OF LANGUAGE DOESN'T PROVE A
18 CASE.

19 IF WE WERE LOOKING AT THIS, AND I WOULD URGE THE COURT
20 TO TAKE A LOOK AT THIS, AFTER ALL, THIS IS A SUMMARY JUDGMENT
21 MOTION, AND IF YOU SIMPLY, YOU KNOW, APPLY THE STANDARD TYPE OF
22 SUMMARY JUDGMENT ANALYSIS OR A STANDARD TRIAL TYPE ANALYSIS TO
23 WHAT DR. HOFFMAN'S ARGUMENTS ARE, EVEN IF WE WERE TO ACCEPT
24 THEM COMING AS THEY DID LATE AND INAPPROPRIATELY, AFTER THE
25 PICS WERE DUE AND SUBMITTED, THEY DO NOT ESTABLISH

1 INFRINGEMENT, AND SO LOOKING AT THIS AS A SUMMARY JUDGMENT
2 MOTION, SUMMARY JUDGMENT SHOULD BE GRANTED IN THIS CASE.

3 THE COURT: WELL, COUNSEL, OTHER THAN CRI AND
4 CARESTREAM, AND ANY OTHER CASE INVOLVING ANTICANCER, CAN YOU
5 CITE TO ANOTHER CIRCUMSTANCE IN WHICH A DISTRICT COURT GRANTED
6 SUMMARY JUDGMENT FOR DEFECTIVE INFRINGEMENT CONTENTIONS WHERE
7 THE COURT HAD NOT YET CONSIDERED WHETHER TO GRANT LEAVE TO
8 AMEND? NOW, I KNOW THE CASES INVOLVING ANTICANCER, SO TAKING
9 THOSE ASIDE, I'M OBVIOUSLY FAMILIAR WITH THAT, ANYTHING ELSE
10 THAT SHOWS THAT PRIOR TO AN OPPORTUNITY TO AMEND?

11 MR. DE BODO: WELL, YOUR HONOR, THE WAY I LOOK AT IT
12 PROCEDURALLY IS THAT THIS -- THE ANSWER IS OTHER THAN THOSE --
13 YOU'RE ASKING OTHER THAN THE TWO CASES, PUT THEM ASIDE?

14 THE COURT: TAKE THOSE OUT.

15 MR. DE BODO: I DON'T THINK WE HAVE A CASE OTHER THAN
16 THOSE TWO, BUT I THINK THE POINT IS IF WE LOOK AT SUMMARY
17 JUDGMENT MOTIONS -- SUMMARY JUDGMENT IS RIPE AT THIS POINT IN
18 THE CASE. WE'RE ENTITLED TO BRING A SUMMARY JUDGMENT MOTION,
19 AND ANTICANCER UNDERSTOOD THAT WE WERE ENTITLED TO BRING A
20 SUMMARY JUDGMENT, AND THEY DIDN'T COME TO THE COURT AND SAY,
21 "WE WOULD LIKE TO AMEND OUR CONTENTIONS. WE WANT LEAVE TO
22 AMEND." EVEN WHEN THE COURT INVITED A REQUEST, THEY DIDN'T
23 MAKE IT, AND THEY SAID, "NO, WE'LL STICK WITH IT. WE'RE HAPPY
24 TO GO WITH OUR CONTENTIONS."

25 THEY DON'T, OF COURSE, HAVE GOOD CAUSE TO AMEND. I

1 THINK THERE THE LAW IS PRETTY STRONG FOR US IN THIS DISTRICT
2 AND IN OTHER DISTRICTS THAT THERE'S NO RIGHT TO AMEND THESE
3 CONTENTIONS, AND SO THEY'RE KIND OF STUCK, IF ONE APPLIES THE
4 SUMMARY JUDGMENT DOCTRINE, THAT WE NOW LOOK AT THIS AS A
5 SUMMARY JUDGMENT CASE, AND WE LOOK AT WHAT EVIDENCE THEY'RE
6 GOING TO BE PERMITTED TO INTRODUCE, BECAUSE THEY'RE BOUND BY
7 THEIR PICS, THEN THEY ARE LIMITED, IT WOULD SEEM, BY THEIR
8 PICS, AND THINGS LIKE DR. HOFFMAN'S DECLARATION, AND SO FORTH,
9 YOU KNOW, SHOULD NOT BE CONSIDERED UNDER THE RULES IN THIS
10 DISTRICT BECAUSE ULTIMATELY THEY HAVEN'T COME IN AND SHOWN GOOD
11 CAUSE. THEY HAVEN'T ASKED -- TODAY MAY BE THE FIRST REQUEST TO
12 POTENTIALLY, IF IT WAS A REQUEST, TO AMEND THEIR PICS, BUT
13 THEY'VE NOT, YOU KNOW, MADE A GOOD CAUSE SHOWING AS THE
14 DISTRICT REQUIRES.

15 THEY SHOULD BE PRECLUDED FROM MAKING THAT TYPE OF
16 AMENDMENT AND CHANGE BECAUSE UNDER THE RULES IN THIS DISTRICT
17 THEY'RE BOUND BY THE SUBMISSION AND BY THEIR PICS AND BY THEIR
18 THEORIES THAT THEY OFFERED IN THEIR ORIGINAL CONTENTIONS, AND
19 THEY DON'T INCLUDE THINGS LIKE DR. HOFFMAN'S, YOU KNOW, FILLING
20 IN THE GAPS.

21 THE COURT: LET ME ASK YOU, COUNSEL, ABOUT THE
22 TENTATIVE THAT I GAVE YOU TO CONDITIONALLY GRANT AN OPPORTUNITY
23 TO ANTICANCER TO AMEND ON THE CONDITION IT REIMBURSE FOR THE
24 COSTS ASSOCIATED WITH LITIGATING THIS MOTION. COMMENT ON THAT,
25 IF YOU WOULD, SIR.

1 MR. DE BODO: SURE. WELL, YOUR HONOR, I APPRECIATE
2 THAT, AND SO I'LL JUST SAY INITIALLY I THINK THE ONLY WAY THAT
3 ANTICANCER SHOULD BE PERMITTED TO MAKE ANY AMENDMENT AT THIS
4 POINT WOULD BE TO REIMBURSE THE COSTS, AND I WOULD SAY THE
5 COSTS OF THE MOTION. I WOULD ALSO SAY THE COSTS OF OUR
6 INVALIDITY CONTENTIONS, WHICH WERE WORKED ON AND SUBMITTED IN
7 THE ABSENCE OF INFORMATION.

8 THE COURT: AND YOU ALSO INCLUDE THE CLAIM
9 CONSTRUCTION.

10 MR. DE BODO: CLAIM CONSTRUCTION, YES.

11 THE COURT: YOU JUST ANTICIPATED MY NEXT QUESTION. WHY
12 SHOULD ANTICANCER BE FORCED TO PAY FOR ALL OF THAT, SIR?

13 MR. DE BODO: BECAUSE THE STRUCTURE OF THE RULES IN
14 THIS DISTRICT ARE THAT ANTICANCER CAME IN WITH THEIR CLAIMS.
15 THEY MADE THEIR ASSERTIONS, INFRINGEMENT CONTENTIONS COME FIRST
16 IN ORDER. WE ARE ENTITLED TO READ THOSE INFRINGEMENT
17 CONTENTIONS, AND TO INTERPRET THEM, AND TO DETERMINE WHAT PRIOR
18 ART WOULD BE RESPONSIVE BASED ON THE READING OF THE CLAIMS THAT
19 ANTICANCER'S PROVIDED.

20 THE COURT: WOULDN'T YOU HAVE HAD TO PREPARE THOSE IN
21 ANY EVENT?

22 MR. DE BODO: WELL, WE'RE GOING TO HAVE TO DO WORK OVER
23 AGAIN BECAUSE THEY'RE GOING TO NOW MODIFY THEIR CLAIMS. IN
24 OTHER WORDS, WHAT THEY SAID IN NOVEMBER, WHEN THEY SUBMITTED
25 THEIR FIRST INFRINGEMENT CONTENTIONS, LED US DOWN A PARTICULAR

1 PATH. THEY'RE NOW CHANGING, IN SOME RESPECTS, THEIR ANALYSIS,
2 SO IT MAY NOT BE A 100 PERCENT THING.

3 THE COURT: HOW WOULD YOU EVER CALCULATE THAT, COUNSEL?
4 HOW WOULD YOU EVER ASSOCIATE THE ADDITIONAL COSTS TO RE-PREPARE
5 THOSE THINGS AS RESULTING FROM THE INITIAL INSUFFICIENT
6 CONTENTIONS?

7 MR. DE BODO: WELL, I THINK UNDER THESE CIRCUMSTANCES,
8 I MEAN, THERE DOESN'T SEEM TO BE A LOT OF EXCUSE OR EXPLANATION
9 OFFERED FOR THE INADEQUATE CONTENTIONS, AND IT SEEMS THAT AS
10 BETWEEN ANTICANCER -- REMEMBER, PUTTING IT INTO CONTEXT,
11 ANTICANCER'S LITIGATED THESE PATENTS MULTIPLE TIMES, AS THE
12 COURT KNOWS, AND IT'S VERY FAMILIAR WITH THE PATENTS. IT
13 SHOULD BE ABLE TO PROVIDE INFRINGEMENT CONTENTIONS THAT ARE,
14 YOU KNOW, CALIBRATED, PRECISE AND INFORMATIVE. IN NOT DOING
15 THAT NOW, AFTER HAVING LITIGATED MANY CASES, AND HAVING HAD
16 SUMMARY JUDGMENT GRANTED SEVERAL TIMES, IT'S REALLY -- I MEAN,
17 AS BETWEEN PFIZER, TRYING IN GOOD FAITH TO INTERPRET WHAT'S
18 BEING SAID, AND ANTICANCER, CERTAINLY ANTICANCER SHOULD PAY
19 SOME SUBSTANTIAL PORTION OF THE WORK THAT NEEDS TO BE DONE IN
20 TERMS OF THE INVALIDITY CONTENTIONS AND THE MARKMAN CLAIM
21 CONSTRUCTION CONTENTIONS.

22 AGAIN, I THINK THE COURT -- IF THE COURT WANTS OUR
23 ASSESSMENT, WE WOULD BE HAPPY TO MAKE A -- TO SORT OF GIVE AN
24 ESTIMATE AND THEN PERHAPS CALIBRATE IT, DEPENDING ON HOW MUCH
25 OF THE WORK WILL HAVE TO BE REDONE. WE WOULD BE HAPPY TO DO

1 THAT IF THAT WOULD BE HELPFUL.

2 I WOULD ALSO SUGGEST THAT THERE SHOULD BE AN ASSESSMENT
3 OF FEES BASED ON THE '812 PATENT BECAUSE, YOU KNOW, THE LAW IS
4 PRETTY CLEAR ON THE '812 PATENT THAT, YOU KNOW, IT'S NO LONGER
5 A VALID PATENT TO BE ASSERTED, AND EVEN AFTER WE BROUGHT THIS
6 TO ANTICANCER'S ATTENTION IN OUR FIRST PLEADING, ANTICANCER HAS
7 CONTINUED TO ASSERT THE '812 PATENT AND, FOR EXAMPLE, IN
8 MARKMAN CLAIMS, AND SO FORTH, AND SUBMISSIONS, THEY'VE NOW
9 CONTACTED US AND SAID THE '812 IS OUT OF THE CASE IN ANY
10 RESPECT, SO WE CONTINUE TO BE BURDENED BY THE '812 PATENT AND
11 HAD TO CONSIDER THESE ALLEGATIONS AS WELL.

12 SO I THINK ALL OF THOSE THINGS WOULD BE APPROPRIATE FOR
13 THE COURT TO ASSESS BEFORE CONSIDERING ALLOWING ANTICANCER TO
14 AMEND, BUT I DO BELIEVE THAT SINCE THIS WAS STYLED AS A SUMMARY
15 JUDGMENT MOTION, SINCE WE MADE THOSE SUBMISSIONS, SINCE
16 ANTICANCER TREATED IT AS A SUMMARY JUDGMENT MOTION AND DID NOT
17 ASK TO AMEND OR BE RELIEVED, AND SINCE THEY MADE A SUBMISSION
18 FROM AN EXPERT, I THINK THAT GIVEN THE SHOWING, AND THE LACK OF
19 SHOWING BY THE EXPERT, WE THINK THAT SUMMARY JUDGMENT SHOULD BE
20 GRANTED.

21 THE COURT: I APPRECIATE THAT.

22 I HAVE A QUESTION FOR MR. LI ON THIS MOTION, MR. LI,
23 CAN YOU HEAR ME?

24 MR. LI: YES, YOUR HONOR.

25 THE COURT: MR. LI, THE COURT NOTES THAT CROWNBIO ONLY

1 JOINED IN PFIZER'S MOTION AND DID NOT PREPARE ITS OWN BRIEF IN
2 SUPPORT OF THIS PARTICULAR MOTION. ASSUMING THE COURT'S
3 TENTATIVE RULING STANDS, WOULD CROWNBIO BE SEEKING ANY
4 REIMBURSEMENT OF COSTS BEYOND THE COST OF ATTENDING TODAY'S
5 HEARING?

6 MR. LI: PROBABLY NOT. WE'VE SPENT VERY LITTLE TIME.
7 WE JUST FILED A ONE-LINER JOINDER, AND IF WE CAN GET THE COSTS
8 OF TODAY'S HEARING, THAT WOULD BE GOOD, YEAH.

9 THE COURT: SO GO BACK -- SO BASICALLY YOU WOULDN'T BE
10 SUBMITTING ANYTHING -- I JUST HAD PROBLEMS HEARING YOU AT THE
11 END, SIR, STATE THAT AGAIN.

12 MR. LI: I'M SORRY. YES, YOU'RE RIGHT, WE DID NOT
13 SPEND A LOT OF TIME PREPARING THE JOINDER. IF WE SUBMIT
14 ANYTHING, IT WILL BE REALLY MINIMUM AMOUNT.

15 THE COURT: OKAY.

16 MR. LI: BUT WE WOULD LIKE TO GET REIMBURSED FOR OUR
17 FEES TO ATTEND TODAY'S HEARING.

18 THE COURT: SO FEES FOR TODAY, BUT EVERYTHING ELSE
19 WOULD BE VERY MINIMAL.

20 MR. LI: CORRECT.

21 THE COURT: AS EVERYBODY OBVIOUSLY KNOWS, I GRANTED
22 YOUR REQUEST TO APPEAR TELEPHONICALLY TODAY, SO THAT'S FINE.
23 THANK YOU, MR. LI.

24 I WOULD NOW LIKE TO TURN TO THE MOTION FOR JUDGMENT ON
25 THE PLEADINGS, AND I HAVE SOME QUESTIONS FOR ANTICANCER ON

1 THAT, COUNSEL.

2 MR. VALENTI: THANK YOU, YOUR HONOR.

3 THE COURT: SO DON'T LEAVE US, MR. LI. MR. LI?

4 MR. LI: YES, I'M HERE.

5 THE COURT: MY FIRST QUESTION IS THIS, CAN YOU POINT TO
6 ANY ALLEGATIONS CONTAINED IN THE FOUR CORNERS OF THE FIRST
7 AMENDED COMPLAINT AS TO YOUR 271(G) THEORY OF INFRINGEMENT,
8 COUNSEL?

9 MR. VALENTI: SURE. IF YOU WOULD PERMIT ME A MOMENT,
10 YOUR HONOR.

11 MOST OF ALL IS THE EVIDENCE THAT WE SUBMITTED IN THE
12 COMPLAINT, WHICH IS THE ABSTRACT OR THE POSTER THAT WAS JOINTLY
13 DONE BY PFIZER AND CROWN, AND THE IMPORTANT THING TO CONSIDER
14 THERE IS THAT NOT ONLY DID IT IDENTIFY PFIZER AS A U.S.
15 COMPANY, CROWN IS ALSO A U.S. COMPANY, BUT I THINK THREE OUT OF
16 THE FIVE SCIENTISTS ON THAT PAPER ARE ALSO U.S. SCIENTISTS, SO
17 WE DO BELIEVE THAT THERE ARE FACTS THAT WOULD INDICATE THAT AT
18 THE VERY LEAST THIS INFRINGEMENT WAS DONE BY TWO U.S.
19 COMPANIES. THE FIRST AUTHOR AND THE LAST AUTHOR ARE BOTH U.S.
20 SCIENTISTS FROM PFIZER. WE KNOW THAT PFIZER DEVELOPED A DRUG
21 BASED ON THIS RESEARCH, AND SO I THINK THERE IS SUFFICIENT
22 EVIDENCE IN THE COMPLAINT THAT THERE WAS SOME FORM OF
23 IMPORTATION OF THIS ACTIVITY INTO THE UNITED STATES.

24 THE COURT: ISN'T THE THEORY THAT YOU'RE ESPOUSING
25 FORECLOSED BY THE FIFTH CIRCUIT IN BAYER, COUNSEL? TALK ABOUT

1 THAT CASE A LITTLE BIT AND YOUR THEORY, SIR.

2 MR. VALENTI: SURE. WE TRIED TO DISTINGUISH THAT IN
3 OUR BRIEF. I THINK IT IS A DIFFICULT CASE FOR US, I'LL ADMIT,
4 BUT AS WE POINTED OUT NOT ONLY ARE THERE POLICY REASONS WHY WE
5 BELIEVE THAT IT WOULD BE AN EXTREMELY UNFAIR RESULT TO GRANT
6 THEIR MOTION BASED ON THESE FACTS, BUT THERE ALSO IS A QUESTION
7 OF FACT THAT STILL EXISTS OVER WHETHER THIS ACTIVITY WAS DONE
8 IN CHINA OR NOT, WHETHER IT WAS DONE IN THE U.S., AND WHETHER
9 IT WAS DONE BY U.S. SCIENTISTS.

10 THERE IS A DECLARATION THAT'S BEEN OFFERED BY CROWN
11 THAT INDICATES THAT IT WAS DONE IN CHINA, BUT THAT'S ALL THAT
12 WE HAVE, OTHERWISE, THERE IS EVIDENCE THAT THIS WAS A
13 U.S.-BASED ACTIVITY, AND, IN FACT, THERE IS POSSIBLY EVIDENCE
14 THAT CROWN HAS IMPORTED THESE MOUSE MODELS INTO THE U.S. BASED
15 ON THIS ABSTRACT.

16 THE COURT: WITHOUT RELYING -- I KNOW YOUR FEELINGS
17 ABOUT BAYER, BUT WITHOUT RELYING ON AN ARGUMENT THAT MIGHT BE
18 FORECLOSED BY BAYER FOR A MOMENT, IF WE COULD PUT THAT ASIDE,
19 COULD ANTICANCER AMEND THE COMPLAINT TO STATE AN INFRINGEMENT
20 CLAIM OR WOULD AN ATTEMPTED AMENDMENT BE FUTILE IN YOUR
21 OPINION, SIR?

22 MR. VALENTI: THANK YOU, YOUR HONOR. I DON'T THINK IT
23 WOULD BE FUTILE. I THINK WE COULD AMEND THE COMPLAINT TO ADD
24 MORE SPECIFICITY AS TO THE U.S. ACTIVITIES OF CROWN AND PFIZER
25 JOINTLY. WE DO KNOW, AS I MENTIONED, THAT AT LEAST THREE OUT

1 OF THE FIVE SCIENTISTS INVOLVED WERE U.S. SCIENTISTS, BASED IN
2 THE UNITED STATES.

3 THE COURT: DO YOU WANT TO GO BACK AND SAY ANYTHING,
4 COUNSEL, ABOUT THE QUESTION THAT WE DEFERRED AS TO WHETHER OR
5 NOT YOU WOULD CONSIDER THE OPTION THAT THE COURT GAVE YOU ON
6 THE SUMMARY JUDGMENT VERSUS GETTING SUMMARY JUDGMENT ENTERED
7 AGAINST YOU? I DON'T KNOW WHAT THE COURT'S GOING TO DO, BUT IT
8 WAS SOMETHING THE COURT CAME UP WITH, AND I WOULD APPRECIATE
9 YOUR COMMENTS. I DON'T KNOW WHICH WAY THIS IS GOING TO GO.

10 MR. VALENTI: THANK YOU, YOUR HONOR. HONESTLY, WE DO
11 FEEL THAT THAT WOULD BE AN UNFAIR BURDEN CONSIDERING WE STILL
12 BELIEVE THAT THE PICS WERE SUFFICIENT, AND IF I MAY --

13 THE COURT: IF I WERE TO -- I'M JUST TRYING TO GET A
14 SENSE OF THINGS HERE. IF I WERE TO HOLD TO MY TENTATIVE AND
15 SAY THAT THIS IS THE -- SUMMARY JUDGMENT COULD BE GRANTED OR
16 YOU COULD PAY THEIR COSTS OF THIS MOTION -- AND WE HEARD FROM
17 CROWNBIO ON THIS, THEY WOULD JUST LIKE THE TIME SPENT IN
18 APPEARING TODAY, APPARENTLY, AND SOMETHING VERY MINIMAL
19 OTHERWISE, DO THAT AND AMEND.

20 MR. VALENTI: IT'S CERTAINLY SOMETHING WE WOULD
21 CONSIDER, AND I DON'T WANT TO FORECLOSE ON THE POSSIBILITY AT
22 THIS POINT, YOUR HONOR.

23 THE COURT: YOU WOULD HAVE TO, WHAT, KNOW MORE ABOUT
24 WHAT THAT COST WOULD BE?

25 MR. VALENTI: EXACTLY. CERTAINLY. WE'RE A SMALL

1 COMPANY WITH LIMITED RESOURCES, AND, DEPENDING ON EXACTLY WHAT
2 COUNSEL FOR PFIZER AND CROWN CLAIMED, IT WOULD AFFECT OUR
3 CALCULATIONS CERTAINLY. IF IT WAS A RELATIVELY SMALL AMOUNT
4 AND WE FELT FAIR, CERTAINLY WE WOULD CONSIDER IT. IF IT WAS AN
5 ASTRONOMICAL OR WHAT WE FELT WAS AN UNFAIR AMOUNT, THAT WOULD
6 BE MUCH MORE DIFFICULT FOR US TO AGREE TO.

7 ON THE OTHER HAND, WE'RE IN A DIFFICULT POSITION AS A
8 SMALL COMPANY WHO FINDS EVIDENCE OF INFRINGEMENT BY A LARGE
9 COMPANY, SUCH AS PFIZER, AND IF I MAY VERY BRIEFLY, YOUR HONOR,
10 RESPOND TO A FEW OF THE POINTS THAT MR. DE BODO MADE.

11 THE COURT: I JUST HAD ONE QUESTION LEFT FOR DEFENSE SO
12 YOU CAN CONSIDER THIS YOUR TIME TO COMMENT, SO GO AHEAD.

13 MR. VALENTI: THANK YOU, YOUR HONOR.

14 FIRST OF ALL, I HEARD MR. DE BODO SAY THAT THIS KIND OF
15 LANGUAGE IN THE PICS DOESN'T PROVE A CASE, AND, AS THE COURT
16 INDICATED EARLIER, THAT IS NOT THE PURPOSE OF THE PICS. THE
17 PICS AREN'T TO LITIGATE THE SUBSTANTIVE ISSUES OF INFRINGEMENT.
18 THEY'RE TO PUT THE DEFENDANT ON NOTICE OF WHAT THE PLAINTIFF'S
19 THEORIES OF INFRINGEMENT ARE.

20 WE STILL BELIEVE THAT WE DID THAT QUITE WELL, AND I
21 FIND IT INTERESTING TO POINT OUT THAT FOR ALL THE COMPLAINTS
22 THAT WE'VE HEARD ABOUT HOW DEFICIENT THESE PICS SUPPOSEDLY ARE,
23 PFIZER WAS ONLY ABLE TO IDENTIFY A MERE THREE ELEMENTS TO
24 ATTACK. I THINK THAT'S SIGNIFICANT. I THINK THAT SHOWS THAT
25 WE DID DO AN EXCELLENT JOB OF PRESENTING OUR CASE IN THE PICS.

1 NOW, THEY DID IDENTIFY THESE THREE ELEMENTS WHICH THEY
2 SAY ARE MISSING AND, THEREFORE, MAKE THE PICS INSUFFICIENT, BUT
3 AS I'VE ARGUED, AND I DON'T WANT TO BELABOR THE POINT, WE
4 BELIEVE THAT THOSE ELEMENTS WERE INHERENTLY IDENTIFIED IN THE
5 PICS.

6 WHEN I USE THE WORD "INHERENT," I USE IT IN ITS COMMON,
7 PLAIN ENGLISH SENSE, NOT IN ANY PATENT DOCTRINE. IT'S A SIMPLE
8 CONCEPT THAT YOU COULD CALL IT COMMON SENSE. COULD YOU SAY
9 THAT SCIENTISTS FROM PFIZER WOULD CERTAINLY KNOW THE BASIC
10 SCIENTIFIC CONCEPTS BEHIND THIS? DID WE SPELL IT OUT IN
11 EXCRUCIATING DETAIL? PERHAPS NOT, BUT I DON'T THINK THAT WE
12 WERE OBLIGATED TO DO SO. I THINK WE SPELLED IT OUT IN
13 SUFFICIENT DETAIL TO CERTAINLY PUT THEM ON NOTICE OF WHAT OUR
14 THEORIES OF INFRINGEMENT ARE.

15 WE'RE FORTUNATE TODAY TO HAVE DR. HOFFMAN WITH US, AND
16 IF THE COURT IS INCLINED, HE'S CERTAINLY AVAILABLE TO ANSWER
17 QUESTIONS ON A MORE SPECIFIC SCIENTIFIC QUESTIONS, BUT I DO --
18 AGAIN, WITHOUT BELABORING THE POINT, I DO THINK THAT THE THREE
19 ELEMENTS THAT THEY IDENTIFIED WERE SUFFICIENTLY STATED IN OUR
20 PICS, THEREFORE, I DO BELIEVE THAT SUMMARY JUDGMENT SHOULD BE
21 DENIED ON THAT BASIS.

22 THE COURT: THANK YOU.

23 MR. VALENTI: THANK YOU, YOUR HONOR.

24 THE COURT: I DON'T HAVE ANY SPECIFIC QUESTIONS OF DR.
25 HOFFMAN AT THIS TIME. IF THERE'S ANYTHING THAT YOU THINK

1 SHOULD BE ADDED, I'M HAPPY TO ENTERTAIN IT, BUT I THINK WHAT I
2 HAVE IS SUFFICIENT FOR OUR PURPOSES TODAY.

3 MR. VALENTI: THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU.

5 I HAVE A FINAL QUESTION FOR PFIZER. COUNSEL, IS IT
6 YOUR ARGUMENT THAT YOU COULD LITERALLY INFRINGE ON ANTICANCER'S
7 PATENT, BUT SO LONG AS YOU DO SO OUTSIDE OF THE UNITED STATES,
8 AND SO LONG AS YOU DON'T IMPORT A PRODUCT MADE BY THE PATENTED
9 PROCESS INTO THE UNITED STATES, THAT ANTICANCER HAS NO
10 RECOURSE? IS THAT NOT, AS ANTICANCER CHARACTERIZES IT, A
11 LOOPHOLE IN THE PATENT LAW?

12 MR. DE BODO: WELL, AS THE COURT KNOWS FROM OUR EARLIER
13 STATEMENTS ABOUT THE PATENTS, AND IF WE'RE TALKING ABOUT THE
14 FIFTH CAUSE OF ACTION, SO WE'RE TALKING ABOUT THE '337 PATENT,
15 THE METASTASIS ELEMENT, RIGHT, TO A SECONDARY SITE IS CLEARLY
16 NOT MET BY THE ARTICLE. SO I'M JUST STARTING -- THE QUESTION
17 IS A LITTLE HYPOTHETICAL BECAUSE I WOULD SAY IT'S NOT OUR CASE
18 BECAUSE I THINK WE'VE PROVEN, AND WE'RE PREPARED TO PROVE, THAT
19 WE'RE NOT USING THIS PATENT. EVEN IF EVERY ACTIVITY DESCRIBED
20 IN THE POSTER WERE OCCURRING IN THE UNITED STATES, THERE WOULD
21 BE NO INFRINGEMENT, AND THAT'S OUR POSITION, AS I THINK THE
22 COURT UNDERSTANDS BASED ON OUR OTHER BRIEF.

23 IN TERMS OF THE LAW, THE LAW IS PRETTY CLEAR, YOU KNOW,
24 PATENTS RELATE TO AN EXERCISE OF U.S. GOVERNMENT AUTHORITY, AND
25 SO IF SOMEONE IS DOING ACTIVITIES IN ANOTHER COUNTRY, AND IT

1 HAS A PROCESS -- A PATENT RELATING TO HAVING A MOUSE MODEL OR
2 MAKING A MOUSE MODEL, IF THAT GOES ON WITHIN THE FOUR CORNERS
3 OF CHINA, FOR EXAMPLE, U.S. PATENTS DON'T EXTEND, AND ONE WOULD
4 NOT BE INFRINGING U.S. PATENTS.

5 I GUESS WHAT I WOULD SAY ALSO IS, IN ADDITION -- I
6 THINK THE BAYER CASE IS VERY STRONG ON THIS, BUT I GUESS I
7 WOULD ALSO, TO THE EXTENT THAT THERE'S AN ISSUE ABOUT
8 INFORMATION THAT FLOWS FROM RESEARCH THAT'S DONE ABROAD, AND
9 WHETHER DATA AND INFORMATION CAN BE BROUGHT IN AND SO FORTH,
10 THERE ARE ADDITIONAL CASES POST-BAYER, WHILE NOT ON THE EXACT
11 ISSUES IN THIS CASE, I THINK THEY MIGHT BE INSTRUCTIVE IN
12 ADDITION TO BAYER.

13 THE *NTP VS. RESEARCH IN MOTION* CASE, 418 F.3D 1282,
14 1323, FEDERAL CIRCUIT 2005, CERT. DENIED IN 2006, SHOWS THAT
15 THE FEDERAL CIRCUIT CONTINUES TO SUBSCRIBE TO THE *BAYER*
16 PRINCIPLES IN TERMS OF DATA.

17 SO I WOULD SAY THAT, IN ANSWER TO THE COURT'S QUESTION,
18 THE LAW APPEARS TO BE, UNDER THE FEDERAL CIRCUIT, THAT USING
19 DATA FROM EXPERIMENTS DONE ABROAD CANNOT BE A BASIS IF THE
20 CLAIMED PATENTED ACTIVITY OCCURRED ENTIRELY IN ANOTHER COUNTRY
21 AND NOT IN THE UNITED STATES. THERE CAN BE EXCEPTIONS. THERE
22 ARE OTHER PROVISIONS, AND SO FORTH, BUT IN THE CIRCUMSTANCES OF
23 THIS CASE, I WOULD SAY THAT IT WOULD NOT GIVE RISE TO
24 LIABILITY.

25 IF I COULD TAKE A SECOND, YOUR HONOR --

1 THE COURT: COUNSEL, THAT WAS THE ONLY OTHER QUESTION I
2 HAD FOR YOU. IF YOU WANT TO TAKE A FEW MOMENTS AND TELL ME
3 SOMETHING, GO AHEAD.

4 MR. DE BODO: IF THAT'S OKAY, I WOULD APPRECIATE IT.

5 I GUESS I WOULD JUST LIKE TO SAY A COUPLE OF THINGS IN
6 RESPONSE TO COUNSEL'S COMMENTS. ONE COMMENT I GUESS I THINK
7 COUNSEL ASSERTED THAT PFIZER DEVELOPED A PRODUCT BASED ON THIS
8 RESEARCH. I THINK THAT WAS SOMETHING THAT WAS SUGGESTED BY
9 COUNSEL, AND THE PRODUCT THAT WAS USED IN THE EXPERIMENTS THAT
10 ARE AT ISSUE IN THE POSTER IS SUTENT, WHICH WAS DEVELOPED YEARS
11 BEFORE ANY OF THE EXPERIMENTS THAT HAVE BEEN CONDUCTED THAT ARE
12 THE SUBJECT OF THE POSTER, SO I DON'T THINK THAT'S ACCURATE. I
13 DON'T KNOW IF ALL OF THAT INFORMATION IS IN THE RECORD BECAUSE
14 IT WASN'T AN ASSERTION THAT WAS MADE, BUT IT'S JUST NOT
15 ACCURATE THAT SUTENT WAS DEVELOPED USING THIS DATA.

16 IN ADDITION, COUNSEL SAID, YOU KNOW, THAT THERE WERE
17 ISSUES ABOUT WHERE THE LOCATION WAS OF THE EXPERIMENTS THAT
18 WERE DONE BY CROWNBIO, BUT I THINK THE RECORD IS QUITE CLEAR
19 THAT IF YOU TAKE CROWNBIO'S INITIAL MOTION, WITH ITS
20 DECLARATION, IT IS MAKING A CLEAR ASSERTION, AND WITH SWORN
21 TESTIMONY, THAT THE EXPERIMENTS WERE DONE ENTIRELY IN CHINA.

22 ANTICANCER DIDN'T DISPUTE THAT. THAT IS NOT DISPUTED
23 BY ANTICANCER IN THEIR PAPERS. SO THIS IS A FULLY JOINED
24 ISSUE, AND IT'S A SUMMARY JUDGMENT MOTION, BECAUSE BOTH SIDES,
25 INCLUDING ANTICANCER, HAVE OFFERED TESTIMONY ON THIS MOTION.

1 DR. HOFFMAN HAD A DECLARATION ON THIS AS WELL. AND SO THEY
2 DIDN'T DISPUTE THIS AT ALL. SO AS THINGS ARE UNDER THE
3 RULES -- UNDER THE FEDERAL RULES, THERE ISN'T A DISPUTE ABOUT
4 THE LOCATION. I DON'T KNOW THAT THERE'S ANYTHING IN THE PAPER,
5 THAT ANYTHING HAS BEEN POINTED OUT THAT SUGGESTS THE
6 EXPERIMENTS WERE DONE IN SOMEWHERE OTHER THAN CHINA, BUT I
7 THINK THE FINDING, YOU KNOW, BASED ON THIS MOTION HAS TO BE
8 PRETTY CLEAR THAT IT WAS ALL DONE IN CHINA.

9 ANOTHER POINT BY ANTICANCER WAS THAT THERE WAS A
10 COMMENT MADE THAT, YOU KNOW, THE PICS WERE SOMEHOW HELD UP AS
11 SUFFICIENT BECAUSE THERE WERE ONLY THREE ELEMENTS THAT PFIZER
12 FOCUSED UPON IN THIS MOTION. WELL, THERE ARE PLENTY OF
13 ELEMENTS IN THE PATENTS THAT ARE NOT SATISFIED. WE PICKED THE
14 THREE ELEMENTS WE DID BECAUSE THEY'RE REPEATED THROUGHOUT
15 MULTIPLE CLAIMS, AND SO THEY ARE -- ALL OF THE DIFFERENT
16 MULTIPLE CLAIMS ASSERTED AGAINST PFIZER WOULD BE PICKED UP BY
17 THESE THREE ELEMENTS, AND SO WE TRIED TO MAKE THAT -- THE
18 MOTION A LITTLE BIT SIMPLER AND MORE COMPACT, BUT IT CERTAINLY
19 DOESN'T INDICATE THAT THIS IS A MODEL OF CLEAR PLEADING AND
20 THAT THE PICS ARE REVEALING.

21 I ALSO WANTED TO FINALLY SAY THAT THE COURT ASKED ME
22 BEFORE ABOUT WHETHER I HAD CASES, OTHER THAN THE COURT'S OWN
23 CASES, ABOUT SUMMARY JUDGMENT IN THIS TYPE OF SITUATION, AND I
24 WOULD LIKE TO OFFER A COUPLE OF CASES THAT I THINK ARE RELEVANT
25 IN THIS ASPECT. THEY'RE CASES WHERE SUMMARY JUDGMENT WAS

1 GRANTED AT A TIME WHERE PLAINTIFFS WERE TRYING TO AMEND THEIR
2 PICS, AND SO THEY HAD PRELIMINARY INFRINGEMENT CONTENTIONS, AND
3 THE COURT SAID, "YOU DON'T HAVE A BASIS TO AMEND YOUR PICS, SO
4 I'M GRANTING SUMMARY JUDGMENT." SO I THINK THAT'S A CLOSE
5 ANALOGY.

6 AGAIN, I'LL JUST CITE THEM FOR THE COURT'S BENEFIT, AND
7 IF THE COURT FEELS THEY'RE RELEVANT, THEN IT'S A WORTHWHILE
8 THING TO DO. *BERGER VS. ROSSIGNOL SKI COMPANY*. IT IS 206 WL
9 1095914, AT PAGES 2 TO 3, NORTHERN DISTRICT CASE, APRIL 25,
10 2006. AND *ATMEL VS. INFORMATION STORAGE SERVICES*, AND IT IS
11 1998 WL 775115, NORTHERN DISTRICT OF CALIFORNIA, NOVEMBER 5,
12 1998.

13 I THINK THERE ARE INDICATIONS OF OTHER COURTS
14 ADDRESSING A SIMILAR PROBLEM AND GRANTING SUMMARY JUDGMENT AND
15 NOT PROVIDING LEAVE, AND IF THE ANALOGY IS NOT PERFECT, THEN I
16 APOLOGIZE, IT'S JUST FOR WHATEVER VALUE THE COURT FINDS.
17 THAT'S ALL. THANK YOU VERY MUCH.

18 THE COURT: MR. VALENTI.

19 MR. VALENTI: THANK YOU, YOUR HONOR. JUST A BRIEF
20 RESPONSE.

21 FIRST OF ALL, RESPECTFULLY, I DON'T THINK THAT COUNSEL
22 DIRECTLY ANSWERED YOUR QUESTION ABOUT WHETHER THERE IS, IN
23 FACT, A LOOPHOLE IN THE PATENT LAW, AND I'M NOT GOING TO ANSWER
24 THAT QUESTION EITHER. WE BELIEVE IT'S A PERCEIVED LOOPHOLE,
25 BUT WHETHER IT'S A PERCEIVED LOOPHOLE OR AN ACTUAL LOOPHOLE,

1 WHAT I'M HEARING IS DEFENDANTS SUCH AS PFIZER, VERY LARGE,
2 MULTI-NATIONAL PHARMACEUTICAL COMPANY WITH EXTREMELY VAST
3 RESOURCES, CAN SIMPLY CONTRACT OUT THEIR INFRINGEMENT, THAT
4 THEY CAN ACTUALLY JUST PRESENT THE OUTSOURCING DEFENSE AND SAY,
5 "SORRY, WE DID IT IN CHINA."

6 IF THAT'S THE STATE OF THE LAW, WE WANT TO STATE QUITE
7 FIRMLY THAT THAT'S JUST NOT FAIR AND IT'S INEQUITABLE,
8 ESPECIALLY FOR A COMPANY SUCH AS OURS, WHICH HAS RESEARCH TOOLS
9 PATENTS, AND IF THIS IS THE STATE OF THE LAW, AND THE LAW IS
10 GOING TO STAY THAT WAY, IT'S GOING TO EVISERATE THE VALUE OF
11 RESEARCH TOOLS PATENTS FOR COMPANIES ALL OVER AMERICA, AND WE
12 DON'T THINK THAT THAT'S A FAIR RESULT.

13 I ALSO WANT TO POINT OUT THAT COUNSEL INDICATED THAT
14 SUTENT WAS DEVELOPED PRIOR TO THIS RESEARCH, AND, OF COURSE,
15 SUTENT DID EXIST PRIOR TO THE RESEARCH, BUT IT'S CLEAR THAT THE
16 ACTIVITIES THAT PFIZER AND CROWN PERFORMED TOGETHER, WHICH
17 CLEARLY INFRINGE, WERE DONE IN FURTHERANCE OF THE DEVELOPMENT
18 OF SUTENT, PARTICULARLY AS A TREATMENT FOR LIVER CANCER.

19 INDEED, THEY DID CREATE A PRODUCT OR RECONFIGURE A
20 PRODUCT BASED ON THE INFRINGING ACTIVITIES THAT WERE PERFORMED,
21 AND SO I THINK THERE IS DEFINITELY A FACTUAL ARGUMENT TO BE
22 MADE THAT PFIZER AND CROWN DID INDEED IMPORT THE RESULTS OR THE
23 ACTUAL -- THE IMPORTANT PART OF THE RESEARCH THAT THEY GAINED
24 FROM INFRINGING WAS USED TO FORMULATE SUTENT AS A LIVER CANCER
25 TREATMENT.

1 AGAIN, WE JUST THINK IT WOULD BE INCREDIBLY INEQUITABLE
2 FOR A BIG COMPANY LIKE THAT TO BE ABLE TO SAY, "SORRY, WE HAVE
3 THE OUTSOURCING DEFENSE. SINCE WE DID IT IN CHINA, WE'RE
4 SCOT-FREE." WE JUST THINK THAT THAT'S AN INEQUITABLE RESULT.
5 THANK YOU, YOUR HONOR.

6 THE COURT: LET ME ASK MR. LI. MR. LI, IS THERE
7 ANYTHING YOU WANT TO SAY, SIR?

8 MR. LI: SURE. I HAVE TWO POINTS I WANT TO COMMENT ON;
9 ONE IS ABOUT THE FUTILITY TO AMEND, LIKE MR. DE BODO INDICATED,
10 THERE'S NO EVIDENCE OR ALLEGATION ON THE RECORD THAT INDICATED
11 THEY WILL HAVE ANY GOOD FAITH BASIS TO MAKE ANY ALLEGATIONS
12 THAT CAN SUPPORT INFRINGEMENT UNDER 271(D) -- SECTION 271(D).

13 YOU SEE THE ONLY FACT ALLEGATION COUNSEL POINTED TO IS
14 THE FACT THERE'S THREE U.S. SCIENTISTS AS THE CO-AUTHOR OF THAT
15 ABSTRACT. THAT IS SPECULATION. THOSE SCIENTISTS WERE INVOLVED
16 IN ANALYZING THE DATA, AND -- TO REACH THE CONCLUSION IN THAT
17 PAPER TO BE PUBLISHED. SO BASICALLY I DON'T THINK THAT THERE'S
18 ANY INDICATION THAT THEY CAN AMEND THE COMPLAINT TO PASS THE
19 MUSTER FOR THE PLEADINGS STANDARD, AND SO I THINK IT WOULD BE
20 FUTILE TO ALLOW THEM TO AMEND AND FOR THE COURT TO JUST GRANT
21 THE MOTION WITHOUT LEAVE TO AMEND.

22 SECOND, I ALSO WANT TO FOLLOW UP WITH MR. DE BODO'S
23 COMMENTS ABOUT CONVERTING THIS TO A SUMMARY JUDGMENT MOTION
24 BECAUSE BOTH SIDES SUBMITTED DECLARATIONS AND -- WE SUBMITTED
25 DECLARATIONS TO SHOW THE FUTILITY OF AMENDMENT, BUT THEY

1 SUBMITTED DECLARATIONS BASICALLY ARGUING THE FACTS, SO THAT --
2 BY FEDERAL RULE THAT ESSENTIALLY CONVERTS US TO A SUMMARY
3 JUDGMENT MOTION, SO YOUR HONOR CAN RULE BASED ON THE FACT THAT
4 THEY HAVE NOT PROVIDED ANY EVIDENCE TO SUPPORT ANY ALLEGATIONS
5 OF CROWNBIO OR PFIZER IMPORTED A RODENT MODEL CLAIMS ON THE
6 PATENT.

7 SECONDLY, I WANT TO COMMENT ON THE LOOPHOLE ARGUMENT
8 BASED ON WHAT ANTICANCER HAS BEEN ARGUING, BUT ANY POLICY
9 CONSIDERATION IS A BALANCE OF THE INTERESTS. THE SAME ARGUMENT
10 WAS MADE BEFORE THE FEDERAL CIRCUIT AND WAS BASICALLY DEFEATED
11 THERE BECAUSE THE MORE IMPORTANT THING IS IF WE ALLOW
12 INFORMATION -- IMPORT OF INFORMATION TO BE BASIS FOR HAVING --
13 THE COURT REPORTER: I DIDN'T GET THAT.

14 MR. LI: -- THE SLIPPERY SLOPE BECAUSE LIKE THE FEDERAL
15 CIRCUIT GAVE AN EXAMPLE, ONE PERSON --

16 THE COURT: SIR --

17 MR. LI: -- JUST BY PASSING THE BORDER CARRYING THE
18 INFORMATION IN HIS MIND, IN HIS THOUGHTS, IN HIS BRAIN, THAT
19 COULD CONSTITUTE A BASIS FOR INFRINGING, THAT WOULD BE NOT AN
20 ACCEPTABLE WAY FOR ENFORCING THE LAW. SO THAT'S ONE ASPECT
21 BALANCED AGAINST THE PERCEIVED UNFAIRNESS.

22 ANOTHER ASPECT IS ANY BLOCK OF INFORMATION FLOW,
23 ESPECIALLY TECHNOLOGICAL INFORMATION, IN THE LONG RUN WILL BE
24 DETRIMENTAL TO THE DEVELOPMENT OF A SCIENCE AND THE TECHNOLOGY
25 IN THE UNITED STATES. THAT'S A VERY IMPORTANT PART OF THE

1 CONSIDERATION TO BE BALANCED AGAINST THE PERCEIVED UNFAIRNESS.
2
THAT'S IT, YOUR HONOR.

3 THE COURT: OKAY. THANK YOU VERY MUCH, MR. LI.

4 LET ME ASK THOSE IN THE COURTROOM IF THERE'S ANYTHING
5 ELSE ANYBODY WANTS TO SAY.

6 MR. VALENTI: VERY BRIEFLY.

7 THE COURT: CERTAINLY. IN LIGHT OF THE COURT'S
8 TENTATIVE, SIR, I'M GOING TO LET YOU HAVE THE FINAL WORD IN
9 THIS. GO AHEAD.

10 MR. VALENTI: CERTAINLY. THANK YOU, YOUR HONOR.

11 FIRST, I DO WANT TO POINT OUT, IN RESPONSE TO MR. LI,
12 THAT THE ABSTRACT WHICH WE HAVE CITED IN OUR PICS, AND ALSO
13 HAVE INTRODUCED IN THE COMPLAINT AS OUR PRIMARY FORM OF
14 EVIDENCE OF INFRINGEMENT, THE VERY FIRST AUTHOR OF THAT
15 ABSTRACT, MR. GANG GARY LI, IS A U.S. SCIENTIST FROM PFIZER,
16 AND THE SENIOR AUTHOR, THAT'S THE LAST AUTHOR LISTED, DAVID
17 POCALYKO, IS ALSO A U.S. SCIENTIST FROM PFIZER. MR. LI JUST
18 INDICATED THAT ACCORDING TO CROWN THE ONLY THING THAT THOSE
19 U.S. SCIENTISTS DID WAS REVIEW DATA, BUT THAT IS SOMETHING -- I
20 BELIEVE THAT'S MORE APPROPRIATE FOR DISCOVERY. I BELIEVE THAT
21 THIS ABSTRACT SUFFICIENTLY SHOWS EVIDENCE OF U.S.-BASED
22 INFRINGEMENT THAT SHOULD BE SUFFICIENT TO ALLOW IT TO PROCEED
23 TO THE DISCOVERY STAGE, AND WE CAN FIND OUT MORE ABOUT EXACTLY
24 WHAT WERE THE ACTIVITIES IN THE UNITED STATES. THANK YOU, YOUR
25 HONOR.

1 MR. DE BODO: YOUR HONOR, I WANTED TO JOIN MR. LI'S
2 COMMENTS IN TERMS OF SAYING THAT THERE REALLY IS NO BASIS HERE
3 FOR ANTICANCER TO BE ABLE TO AMEND THESE CLAIMS. THE THEORY
4 THAT HAS BEEN STATED IS CONTRARY TO THE LAW OF THE FEDERAL
5 CIRCUIT, IN BAYER AND SUBSEQUENT CASES AND SO, AGAIN, TO
6 SUGGEST THAT DISCOVERY SHOULD BE OPENED WHEN THERE HAS BEEN A
7 SUCCESSFUL SUMMARY JUDGMENT MOTION, THAT BOTH SIDES LITIGATED
8 THE SUMMARY JUDGMENT MOTION THAT ESTABLISHES THERE ISN'T A
9 THEORY -- THERE ISN'T A VIABLE THEORY, AND ALL WE'RE HEARING IS
10 POLICY ARGUMENTS THAT THE LAW SHOULD BE CHANGED, IS REALLY
11 SUBJECTING CROWNBIO, A SMALL COMPANY, AS WELL AS PFIZER,
12 ADMITTEDLY A SOMEWHAT LARGER COMPANY, TO A WASTE OF TIME. I
13 MEAN, PFIZER AND ITS SCIENTISTS ARE ENTITLED TO PUT THIS CASE
14 BEHIND THEM AND TO MOVE ON TO IMPORTANT SCIENTIFIC ENDEAVORS,
15 AND IT'S NOT AN EXCUSE THAT ANTICANCER CLAIMS TO BE A SMALLER
16 COMPANY.

17 IN TERMS OF THE LOOPHOLE ARGUMENT, IF THERE'S A CONCERN
18 ABOUT REACHING ACTIVITIES IN CHINA AND OTHER COUNTRIES,
19 ANTICANCER SHOULD HAVE OBTAINED PATENTS IN OTHER COUNTRIES,
20 LIKE CHINA, AND ENFORCE THOSE PATENTS. THAT'S REALLY THE
21 APPROPRIATE MECHANISM FOR DOING THIS, NOT SAYING THAT WE'RE
22 GOING TO APPLY U.S. PATENTS FOR ACTIVITY THAT OCCURS OUTSIDE OF
23 THE UNITED STATES, WHEN THE FEDERAL CIRCUIT HAS RULED
24 OTHERWISE.

25 FINALLY, THE REFERENCES TO SUTENT I APPRECIATE THAT

1 COUNSEL ACKNOWLEDGED THAT SUTENT HAD BEEN CREATED AND DEVELOPED
2 BEFORE THE WORK IN THIS POSTER. THIS IS A SINGLE POSTER, A
3 SINGLE ARTICLE, AND SO FORTH. IT DID NOT HAVE A SIGNIFICANT
4 IMPACT ON THE DEVELOPMENT OF SUTENT, THE USES OF SUTENT. I
5 MEAN, SO THERE'S REALLY NOT SOME HIDDEN VALUE HERE THAT'S BEEN
6 IMPARTED. SUTENT WAS CONTRIBUTED BY PFIZER TO BE USED IN THESE
7 TESTS, AND THEY WERE -- IT'S A ONE-TIME TEST, AND THEY GOT SOME
8 DATA FOR IT, BUT IT'S CERTAINLY NOT SOME GREAT USE OF THE
9 SUPPOSED PATENTED TECHNOLOGY.

10 THE COURT: THANK YOU. I'M GOING TO GIVE YOU THE FINAL
11 WORD, COUNSEL, AS I PROMISED, AND THEN I'LL DEEM THIS MATTER
12 SUBMITTED. IS THERE ANYTHING YOU WANT TO SAY?

13 MR. VALENTI: THANK YOU, YOUR HONOR. YES, JUST VERY
14 BRIEFLY. I DO WANT TO ADD THAT THE CROWN ABSTRACT, THE VERY
15 FIRST AUTHOR IS THE AUTHOR -- GENERALLY, IN SCIENTIFIC
16 PUBLISHING CONVENTION THE FIRST AUTHOR LISTED IS THE ONE THAT
17 DOES THE EXPERIMENTS, AND THE VERY FIRST AUTHOR IS A U.S.-BASED
18 PFIZER SCIENTIST. THAT SURE RAISES AN INFERENCE THAT THESE
19 EXPERIMENTS WERE DONE BY U.S. SCIENTISTS IN THE UNITED STATES,
20 SO I WANT TO ADD THAT.

21 AND I WANT TO FINALLY SUM UP BY SAYING THAT WHAT I'VE
22 BEEN HEARING TODAY OVER AND OVER FROM BOTH SIDES, ON BOTH OF
23 THESE MOTIONS, IS NOT THAT THE DEFENDANTS DIDN'T INFRINGE, I
24 DIDN'T HEAR THAT ONCE TODAY. AND I HAVEN'T SEEN IN ANY OF THE
25 BRIEFINGS A DECLARATION FROM A SCIENTIST FROM EITHER OF THOSE

1 COMPANIES SAYING, "WE DID NOT INFRINGE" OR "THESE ARTICLES ARE
2 NOT EVIDENCE OF INFRINGEMENT." IT'S PRETTY CLEAR THAT THEY DID
3 INFRINGE, AND, YET, WHAT THEY'RE DOING IS TAKING A VERY
4 PROCEDURAL AND TECHNICAL ARGUMENT AND TRYING TO GET OUR CASE
5 OUT OF THE COURT BASED ON A PROCEDURAL ARGUMENT. CERTAINLY
6 THEY HAVE EVERY RIGHT TO DO THAT.

7 I EQUATE IT WITH THE DAVID AND GOLIATH STORY, AND I
8 EQUATE IT WITH GOLIATH GETTING UP AND SAYING, "SORRY, DAVID,
9 YOU SCORED A DIRECT HIT, BUT YOUR SLINGSHOT JUST WASN'T A
10 REGULATION SLINGSHOT SO IT DIDN'T COUNT." I DON'T BELIEVE THAT
11 WOULD BE A FAIR RESULT, YOUR HONOR. THANK YOU VERY MUCH.

12 THE COURT: IF I LET YOU SAY SOMETHING, I'M GOING TO
13 GIVE HIM THE FINAL WORD, BUT GO AHEAD.

14 MR. DE BODO: YOUR HONOR, IT'S HARD WHEN SOMEONE SAYS
15 THAT HE HASN'T HEARD US SAY THAT WE DON'T INFRINGE, SO I GUESS
16 I FEEL THAT I OWE IT TO THE SCIENTISTS AT PFIZER TO SAY THAT WE
17 DON'T INFRINGE. I THINK WE'VE ESTABLISHED IT IN TERMS OF THE
18 MOTION SAYING THAT THEY'RE MISSING THREE ELEMENTS, AND SO FORTH
19 FORTH, THAT'S CERTAINLY NOT WHAT WE MEAN TO COMMUNICATE. THANK
20 YOU.

21 MR. LI: YOUR HONOR, I ALSO WANT TO CLARIFY IN OUR
22 PAPERS WE SAID -- WE LITIGATING ON THE PROCEDURAL ISSUES BASED
23 ON ASSUMPTION AND IF THIS THING IS FOUND INFRINGING, BUT WE
24 DISPUTE ON THAT POINT, OF COURSE. THAT'S NOT THE ISSUE OF THIS
25 MOTION, SO THAT IS NOT A VALID COMMENT.

1 THE COURT: THANK YOU, MR. LI.

2 ANYTHING FINAL FROM ANTICANCER?

3 MR. VALENTI: NO, THANK YOU, YOUR HONOR.

4 THE COURT: SO THIS MATTER IS DEEMED SUBMITTED. IN
5 LIGHT OF ALL THE COMMENTS AND ANSWERS TO QUESTIONS, I'M GOING
6 TO GO BACK THROUGH IT AGAIN AND YOU'LL HEAR FROM THE COURT.

7 THANK YOU.

8 MR. VALENTI: THANK YOU, YOUR HONOR.

9 MR. DE BODO: THANK YOU, YOUR HONOR.

10 MR. LI: THANK YOU, YOUR HONOR.

11 THE COURT: THANK YOU, MR. LI, GOOD-BYE.

12 (THE HEARING CONCLUDED.)

13
14
15 C E R T I F I C A T E
16
17

18 I, GAYLE WAKEFIELD, CERTIFY THAT I AM A DULY
19 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
STATES DISTRICT COURT, THAT THE FOREGOING IS A TRUE AND
ACCURATE TRANSCRIPT OF THE PROCEEDINGS AS TAKEN BY ME IN THE
20 ABOVE-ENTITLED MATTER ON MAY 31, 2012; AND THAT THE FORMAT USED
COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES
21 JUDICIAL CONFERENCE.

22
23 DATED: NOVEMBER 20, 2012

/S/ GAYLE WAKEFIELD
GAYLE WAKEFIELD, RPR, CRR
OFFICIAL COURT REPORTER